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5

6 **UNITED STATES DISTRICT COURT**
7 **CENTRAL DISTRICT OF CALIFORNIA**
8

9
10 JAMES R. GLIDEWELL DENTAL
CERAMICS, INC. DBA
11 GLIDEWELL LABORATORIES, a
California corporation,

12 Plaintiff

13 vs.

14 KEATING DENTAL ARTS, INC., a
15 California corporation,

16 Defendant.
17

18 KEATING DENTAL ARTS, INC., a
19 California corporation,

20 Counter-Plaintiff,

21 vs.

22 JAMES R. GLIDEWELL DENTAL
CERAMICS, INC., DBA
23 GLIDEWELL LABORATORIES, a
California corporation, and
DOES 1 THROUGH 5, inclusive,

24 Counter-Defendants.
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26
27
28

Case No. SACV11-01309-DOC(ANx)

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S REQUEST FOR
RECONSIDERATION OF
DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGEMENT**

Hearing Date: None Requested

1 INTRODUCTION

2 PLAINTIFF hereby opposes the above-captioned request by Defendant.
 3 Defendant's Motion For Reconsideration is purportedly made under Local Rule 7-
 4 18(c) (see Footnote 1 of Defendant's Motion). Under the Local Rules, such a
 5 motion must be based on "a failure to consider material facts presented to the
 6 Court before such decision" which decision in this instance is the Court's ruling
 7 on Defendant's Motion For Partial Summary Judgment, (heard on March 26,
 8 2012). Plaintiff believes that Defendant's request for reconsideration is not proper
 9 under any provision of Local Rule 7-18 principally because:

- 10 1) Defendant has attempted to belatedly introduce additional facts;
- 11 2) Defendant has attempted to introduce a theory of law (Fair Use) not
 12 previously presented in its original motion and under the laws of this circuit, in
 13 any event summary judgment on the defense of fair use would be improper;
- 14 3) Defendant has not made any showing that such additional facts and
 15 law could not have been presented before the Court's ruling or that they arose as a
 16 result of a discovery or change that occurred after the decision.

17 18 (1) Defendant has Attempted to Belatedly Introduce Additional Facts

19
 20 Rather than unnecessarily burden the Court with a detailed regurgitation of
 21 such "additional facts" referred to in Defendant's Motion for Reconsideration,
 22 Plaintiff need only refer the Court to the following portion of footnote 3 of Exhibit
 23 A (page 15) of Defendant's "Comparison of Original and Proposed Court Orders":
 24

25 "Defendant's Request For Reconsideration included a
 26 substantial effort to address that shortcoming including
 27 incorporating certain additional facts into the overall analysis
 28

1 to better explain why Defendant's trademark does not infringe
2 any rights of Plaintiff."
3 (underlining added).
4

5 Obviously, by the term "additional facts", Defendant means material facts
6 presented to the Court after the decision, not before the decision as required by
7 Local Rule 7-18(c).
8

9 (2) Defendant has Attempted to Introduce a Theory Of Law (Fair Use)
10 Not Previously Presented in its Original Motion
11

12 Defendant for the first time suggests in its Motion For Reconsideration that
13 the Court should reverse its prior ruling because the use of the accused trademark
14 constitutes fair use. Nowhere in its original motion for partial summary judgment
15 did Defendant assert such a defense. Moreover, even if the Court were to consider
16 such a defense only now, the law of Fair Use in the ninth circuit under KP
17 Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 408 F.3d 596, 609 (9th Cir.
18 2005) on remand from the U.S. Supreme Court, would find fair use to be an
19 improper basis for summary judgment.
20

21 "The fair use defense only comes into play once the party
22 alleging infringement has shown by a preponderance of the
23 evidence that confusion is likely. See KP II, 125 S. Ct. at 549.
24 We hold in accordance with Shakespeare Co., 110 F.3d at
25 243, that the degree of customer confusion remains a factor in
26 evaluating fair use."
27
28

1 “Summary judgment on the defense of fair use is also
2 improper. There are genuine issues of fact that are
3 appropriate for the fact finder to determine in order to find
4 that the defense of fair use has been established. Among the
5 relevant factors for consideration by the jury in determining
6 the fairness of the use are the degree of likely confusion....”
7 Id at 609.

8
9 In effect, Defendant has painted itself into a corner. If it wishes the Court to
10 consider Fair Use as a basis for reconsideration of its Motion For Partial Summary
11 Judgment, the Court must decide against Summary Judgment under the law of this
12 circuit.

13
14 (3) Defendant has Made No Attempt to Justify its Submission of Additional
15 Facts or its Reliance on a Fair Use Defense in its request for
16 reconsideration

17
18 Defendant has indicated that its reconsideration motion is submitted under
19 Local Rule 7-18(c). However, under this provision of the local rules, Defendant
20 must rely on a failure of the Court to consider previously submitted facts, not on
21 additionally submitted facts or legal argument not previously presented. If the
22 Defendant relies alternatively on Local Rule 7-18(a) or (b), it must show that
23 either there’s been a material difference in fact or law that could not have been
24 previously known with reasonable diligence or that there are new material facts or
25 a change in the law that occurred after the original decision. Nothing in this
26 regard has been submitted by Defendant and therefore its request for
27 reconsideration is not well-founded and appears to be improper on its face.
28

1
2 For all these reasons the Court should deny Defendant's Request For
3 Reconsideration.
4

5
6 DATED: April 16, 2012

By: /s/ Leonard Tachner
Leonard Tachner
Attorney for Plaintiff/Counter-Defendant

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PROOF OF SERVICE

I am a resident of the state of California, I am over the age of 18 years, and I am not a party to this lawsuit. My business address is 17961 Sky Park Circle, Suite 38-E, Irvine, California 92614. On April 16, 2012, I served the following document(s) in the manner indicated:

1. **PLAINTIFF'S OPPOSITION TO DEFENDANT'S REQUEST FOR RECONSIDERATION OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

- ☒ via electronic means by the Court's electronic filing system CM/ECF.
- ☐ by placing the document(s) listed above in a sealed envelope to the person at the address set forth below by postage prepaid United States First Class United States mail on the same date set out below.

J. Mark Holland
J. Mark Holland & Associates
3 San Joaquin Plaza, Suite 210
Newport Beach, CA 92660

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed April 16, 2012 at Irvine, California.

By: /s/ Jodie Miller

Jodie Miller

Case No.: SACV11-01309-DOC(ANx)
CERTIFICATE OF SERVICE